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No. 86-495 86-624 86-625

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1986

K MART CORPORATION,
Petitioner,
v.
CARTIER, INC., ET AL.,
Respondents.

47TH STREET PHOTO, INC.,
Petitioner,
v.
COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS, ET AL.,
Respondents.

UNITED STATES OF AMERICA, ET AL.,
Petitioners,
v.
COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR AMICUS CURIAE STATE OF WASHINGTON IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the invalidation of 19 CFR 133.21(c) is consistent with the intent of Congress as expressed in the antitrust laws.

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INTEREST OF AMICUS CURIAE

Washington, along with 17 other states,[1] controls the distribution and sale of all liquor within its borders, as authorized by the Twenty-first Amendment to the United States Constitution. This is accomplished through a state

[1]Alabama, Idaho, Maine, Michigan, Mississippi, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, West Virginia, and Wyoming. Montgomery County, Maryland is also a control jurisdiction.

agency, i.e., the Washington State Liquor Control Board.[2] Under the Washington system, all spiritous liquor, foreign and domestic, and some foreign produced wines are purchased by the Board for subsequent resale to the public through 380 state retail outlets.

Approximately one year ago, in response to the artificially high prices being maintained in the United States by the "authorized" United States importers of certain trademarked liquor products, Washington began purchasing those products on the parallel market at savings averaging 15% to 20% per case.

With these parallel purchases, it is estimated that the citizens of Washington have saved to date, in the aggregate, approximately $4.9 million by reason of the reductions from the retail prices they would have paid had this trademarked liquor been purchased only from the foreign manufacturers' exclusive "authorized" United States importers.

Washington has plans to continue, and expand, its purchases of these parallel imports as long as artificially high prices are maintained by "authorized" importers in the United States market vis-a-vis the world price of these goods.

The effect of an affirmance by this Court of the decision below would be to end the ability of Washington, and the potential ability of many other states, as well, to obtain for their citizens the best available world price for imported liquor.

The major concern of Washington is that a decision invalidating 19 C.F.R. § 133.21(c) will bestow enormous economic power on foreign liquor manufacturers in a manner and to an extent unintended by Congress when the "Genuine Goods Exclusion Act" ("Section 526") was enacted.[3] This power will then be used, as it has been in the past, to bring about international price discrimination against the United States market, to the detriment of both

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[2]See Title 66 of the Revised Code of Washington.

[3]The "Genuine Goods Exclusion Act" is Section 526 of the Tariff Act of 1930, and is codified at 19 U.S.C.S. § 1526.

the American consumer individually and the American balance of payments in the aggregate.

While there are many other factors which would warrant the Court in sustaining the validity of 19 C.F.R. § 133.21(c), we will attempt to avoid duplicating the other briefs and will, instead, concentrate on the relationship between the proper construction of Section 526 and the intent of Congress in enacting the Federal antitrust laws, more specifically the Sherman Act.[4]

ARGUMENT

Section 526 was not intended by Congress to be a partial implied repeal of the Antitrust Laws

This Court has likened the antitrust laws to the Magna Carta of free enterprise; their importance to economic freedom has been compared to the importance of the Bill of Rights to personal freedom.[5]

It is the belief of Washington that any construction of Section 526 which would prohibit *all* parallel imports of liquor would further the anti-competitive ends of foreign corporations contrary to the intent of Congress in adopting the antitrust laws.

This Court in *California Liquor Dealers Assoc. v. Midcal Aluminum,* 445 U.S. 97 (1980), reaffirmed, in the context of liquor sales, the effectiveness of the antitrust laws in the absence of a Congressional expression of intent that they should be superseded. The legislative history of Section 526 discloses no intent that it be used for the furtherance of anticompetitive purposes.

In *Rice v. Norman Williams Company,* 458 U.S. 654 (1982) a state "primary source"[6] law was upheld against an antitrust challenge. As this Court first stated in *Parker v.*

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[4]15 U.S.C.S. § § 1, 2.

[5]*United States v. TOPCO Associates, Inc.,* 405 U.S. 596 (1972).

[6]A "primary source" law is one which requires that a commodity be obtained only from the "primary" source, i.e., the manufacturer or its designee.

Brown, 317 U.S. 341 (1943), where a state has specifically displaced competition through its legislative process, Congress could not have intended that action to be subject to penalties under the antitrust laws. In *Rice*, there was such an intent to displace competition, by enactment of the "primary source" law, and the antitrust laws were held not applicable.

In the instant case, there is no national "primary source" law for liquor,[7] or for trademarked goods in general. However, the invalidation of 19 C.F.R. § 133.21(c) would, in effect, make Section 526 a national "primary source" law for foreign produced trademarked liquor. Section 526 would then give the domestic subsidiary of a foreign trademark owner an absolute right to the assistance of the U.S. Customs Service in excluding all parallel trademarked liquor. The foreign trademark owner and its affiliate would thus be able to maintain any resale price they choose in the United States. In antitrust language, this constitutes vertical price fixing.

While vertical restraints consisting solely of territorial market division may have both anti-competitive and pro-competitive aspects, and are thus judged under the rule of reason,[8] *vertical price fixing arrangements* are *per se* violations of the Sherman Act. *Monsanto Company v. Spray Right Service Corporation*, 465 U.S. 752 (1984).

Therefore, if Section 526 in effect grants to the domestic corporate affiliate of a foreign trademark holder the right to have the U.S. Customs Service exclude all trademarked goods, Section 526 would have to be considered a partial implied repeal of the Sherman Act.

The courts have been reluctant to find such partial implied repeals, and will do so only where there is a clear indication of congressional intent to displace the free market. *United States v. National Association of Securities*

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[7] Quite to the contrary, recently the 99th Congress defeated a rider (Section 143) to the 1987 Appropriations Resolution (HJR-738) which would have prevented the parallel importation of wine and liquor. See 132 Cong. Rec. H11080-86 (Daily Ed. October 15, 1986) in which the floor debate and vote to defeat the anti-parallel rider is described.

[8] *Continental T.V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, (1977).

Dealers, Inc., 422 U.S. 694 (1975). The legislative history of Section 526, however, contains no indication of any such intent.

Rather, this legislative history shows that Congress was concerned with the type of fact situation involved in the decision of the Court of Appeals for the 2nd Circuit in *A. Bourjois and Company v. Katzel*, 275 F. 539 (2nd Cir. 1921), *reversed* 260 U.S. 689 (1923). This was a fact situation which the Congress perceived to be a case of fraud on an American trademark owner. This American company was unrelated to the foreign company from which it had purchased the trademark in good faith and for value.[9]

There was no consideration given by Congress to permitting internationally related corporations to raise prices artificially in the United States market through resale price maintenance arrangements.

It is simply not reasonable to conclude that Congress, by enacting Section 526, meant to create an exception to the antitrust laws for the benefit of foreign businesses, especially when the isolationist political climate and protectionist economic policies of the 1920's and 1930's are taken into account. It is even more unlikely that Congress intended to create such an exception at the expense of truly independent American companies, American consumers, and — because the suppression of parallel imports increases the prices of imported goods — to the detriment of the American balance of payments as a whole.

It is also important to bear in mind that if Section 526 *and* 19 C.F.R. § 133.21(c) had been in place when the original dispute in *Katzel* arose, the plaintiff therein would have been entitled to an exclusion order prohibiting the parallel importation of the trademarked face powder. Such an order would have been available because the American trademark owner and the foreign producer in *Katzel* were *not* "related-parties" so as to come within the exception of 19 C.F.R. § 133.21(c).

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[9]This legislative history was discussed by the court below and also in the opinions in *Vivitar Corp. v. U.S.*, 761 F. 2d 1552 (Fed.Cir.1985), cert. denied, 106 S. Ct. 791 (1986) and in *Olympus Corp. v. U.S.*, 792 F. 2d 315 (2nd Cir.1986), aff'g 627 F. Supp. 911 (E.D.N.Y. 1985).

The speed with which Congress acted to overturn the 2nd Circuit in *Katzel,* coupled with the 50 year history of Congressional acquiescence in the Customs Services' administration of Section 526 through the "related-party exception," is a strong indication that the Customs Service has acted within the scope of Congressional intent in adopting 19 C.F.R. § 133.21(c).

Amicus would submit that it is not merely coincidence that 19 C.F.R. § 133.21(c) acts in such a way as to give the American market an alternative to international price discrimination and vertical price fixing between foreign corporations and their domestic marketing subsidiaries. Such an alternative is necessary if Congressional antitrust policy is to be effectively implemented.

The "Related Party Exception" regulation correctly implements the intent of Congress in enacting Section 526

The Customs Service regulation at issue, 19 C.F.R. § 133.21(c), is commonly referred to as the "related party exception" to Section 526.

This regulation implements longstanding Customs Service policy in the administration of Section 526.[10] Specifically, 19 C.F.R. § 133.21(c) permits parallel importation of trademarked goods in cases where the United States trademark holder is the same entity as, or is controlled by,

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[10]19 C.F.R. § 133.21(c) is the present incarnation of the "related-party exception" to Section 526. Prior to the formal adoption of 19 C.F.R. § 133.21(c), the U.S. Customs Service administered Section 526 for over 50 years by consistently refusing to bar parallel imports where doing so would have given the American subsidiary of a foreign manufacturer a monopoly over distribution of its product in the United States market.

In *United States v. Guerlain, Inc.*, 155 F. Supp. 77 (S.D.N.Y. 1957), *vacated and remanded,* 358 U.S. 915 (1958), *action dismissed,* 172 F. Supp. 107 (S.D.N.Y. 1959), an attempt to monopolize a market through the use of Section 526 to exclude parallel imports was held to violate the Sherman Act. Although the value as a precedent of the *Guerlain* case itself is questionable from both a procedural and a substantive viewpoint, the U.S. Customs Service has consistently followed an interpretation of Section 526 which is in accord with the *Guerlain* court's antitrust reasoning and Congress has done nothing to disapprove or reverse that interpretation.

the foreign producer[11] who originally applied the trademark in a foreign country. This is in accord with the intent of Congress as demonstrated by legislative history surrounding the enactment of Section 526.

At its roots, parallel trade has an *economic* cause, as opposed to a *legal* one. That is, parallel trade simply will not occur unless the relationship between the prices charged for an article in two different countries is sufficiently out of line to enable purchase on the free market in the first country and subsequent sale at a profit (but also at a lower price than offered by "authorized" sources) on the free market in the second country. Price disparity of this magnitude does not occur naturally, but is intentionally engineered by producers and their "authorized" distributors to maximize total profit for the related family of businesses.

The interest of Washington in parallel importation arose from the existence of just such a disparity between the prices of many brands of foreign liquor on the world market and the much higher prices charged for the same brands in the United States. This is the result of many foreign liquor producers awarding exclusive "authorized" status to their own marketing subsidiary companies in the United States, while refusing to sell directly to any other United States purchaser. Because this eliminates all intrabrand competition in their products, the foreign producers are able to extract an artificially high price from the American market.

While the option of parallel importation of these products has always been available under 19 C.F.R. § 133.21(c), it is only recently that Washington (later joined by Pennsylvania and Maine)[12] became aware of, and began to exercise, the parallel importation alternative.

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[11]Or where a foreign entity has applied the trademark to the goods with the permission of the United States trademark holder.

[12]It has been estimated that Pennsylvania may be able to save $20 million per year for its citizens through parallel market purchases. See 132 Cong. Rec. H11083 (Daily Ed. October 15, 1986) reporting the remarks of Representative Gaydos of Pennsylvania during debate on an appropriations rider (later defeated) which would have stopped parallel

Washington believes the use of the parallel purchasing option is the only way in which the interests of the consumer can be protected against monopoly driven, artificially inflated prices for foreign liquor, and for other products as well.

CONCLUSION

For the reasons discussed above, this Court should reverse the court below and hold that the U.S. Customs Service was acting within the intent of Congress as to both trade and antitrust policy in its construction of Section 526 through the "related-party exception" presently embodied in 19 C.F.R. § 133.21(c).

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importation of liquor. Maine, a much smaller market than either Pennsylvania or Washington, has purchased an initial order, but definite savings figures have not been developed yet.